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No. 97-643

In The

Supreme Court of the United States

October Term, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

VICKIE S. CABRALES,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit

BRIEF FOR RESPONDENT VICKIE S. CABRALES

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QUESTION PRESENTED

Whether venue in a prosecution for money laundering under 18 U.S.C. §§ 1956 and 1957 is also proper in the district where the illicit funds were generated, when all of the defendant's alleged unlawful financial transactions occurred in another district.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED 1

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. The Constitution demands that a criminal defendant be tried where the crime was "committed" 7

II. Precedent of this Court has established workable guidelines for determining where a crime was "committed" for purposes of determining venue; the government's "essential elements" argument abandons established precedent and offers a "test" that would cause confusion in the law and would provide no analytical framework for determining venue 12

A. Venue is determined by the acts of the accused that violate a statute, *i.e.*, the actus reus element of the offense 12

1. The Eighth Circuit correctly determined that the alleged money laundering offenses were "committed" in Florida 24

TABLE OF CONTENTS – Continued

Page

B. Permitting venue based on the location of any "essential element" of a crime would inject confusion into the law and would announce an unworkable test that would produce absurd results 27

III. The crimes for which Respondent was indicted were allegedly "committed" in Florida 30

A. The underlying criminal conduct is not an element of money laundering 30

B. The crime of money laundering is committed only where the actual acts of money laundering occur, not where the underlying "specified unlawful activity" occurred 32

C. Money laundering does not "begin" with the commission of the underlying "specified unlawful activity" 34

D. By attempting to base venue on an "attendant circumstance" element, the government attempts to redefine what is a "continuing offense" 36

IV. Prosecuting the instant money laundering offenses anywhere other than Florida, where the crime was allegedly "committed", would disrespect the constitutional provisions and the policies underlying them 39

A. The Constitution demands that crimes be prosecuted where the crime is "committed" 39

B. The Constitutional safeguards of venue are for the protection of the accused, not the government 40

TABLE OF CONTENTS – Continued

Page

C. The government's policy argument misperceives the purpose of money laundering statutes and the issues presented at the prosecution of a money laundering offense 42

D. The "acts" test, while upholding the constitutional venue provisions, will not seriously impede the effective prosecution of criminals 44

CONCLUSION 46

TABLE OF AUTHORITIES

Page

CASES:

Armour Packing Co. v. United States, 209 U.S. 56 (1908) 9, 17, 20, 36, 37

County of Washington v. Gunther, 452 U.S. 161 (1981) 22

Hyde v. United States, 225 U.S. 347 (1912) 8, 10

Johnston v. United States, 351 U.S. 215 (1956) 4, 7, 11, 12, 13, 16

Smith v. Allwright, 321 U.S. 649 (1944) 22

Travis v. United States, 364 U.S. 631 (1961) 8, 10, 11, 12, 13, 39

United States v. Anderson, 328 U.S. 699 (1946) .... *passim*

United States v. Beddow, 957 F.2d 1330 (6th Cir. 1992) 15

United States v. Beech-Nut Nutrition Corp., 871 F.2d 1181 (2nd Cir. 1989) 15, 18

United States v. Bozza, 365 F.2d 206 (2nd Cir. 1966) 17

United States v. Chappell, 854 F.2d 190 (7th Cir. 1988) 15

United States v. Cofield, 11 F.3d 413 (4th Cir. 1994) 15

United States v. Cores, 356 U.S. 405 (1958) 7, 9, 10, 13, 17, 37

United States v. Corona, 34 F.3d 876 (9th Cir. 1994) 14

United States v. Crawford, 115 F.3d 1397 (8th Cir.), *cert. denied*, 118 S.Ct. 341 (1997) 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Dimeck, 24 F.3d 1239 (10th Cir. 1994) 35

United States v. Dimeck, 815 F.Supp. 1425 (D.Kan. 1993), *rev'd* on other grounds, 24 F.3d 1239 (10th Cir. 1994) 23

United States v. Donahue, 885 F.2d 45 (3d Cir. 1989) 15

United States v. Edgmon, 952 F.2d 1206 (10th Cir. 1991), *cert. denied*, 505 U.S. 1223 (1992)..... 35

United States v. Freeman, 239 U.S. 117 (1915).....14, 36

United States v. Gabel, 85 F.3d 1217 (7th Cir. 1996)...31, 34

United States v. Georgacarakos, 988 F.2d 1289 (1st Cir. 1993) 14

United States v. Griffin, 814 F.2d 806 (1st Cir. 1987) ..8, 14

United States v. Heaps, 39 F.3d 479 (4th Cir. 1994) 35

United States v. Johnson, 323 U.S. 273 (1944) 6, 7, 12, 13, 41

United States v. Johnson, 971 F.2d 562 (10th Cir. 1992)..... 35

United States v. Lanoue, 1998 WL 78817, ___ F.3d ___ (1st Cir.) 19

United States v. Lombardo, 241 U.S. 73 (1916).....14, 30

United States v. Medina-Ramos, 834 F.2d 874 (10th Cir. 1987) 15

TABLE OF AUTHORITIES – Continued

Page

United States v. Midstate Horticultural Co., 306 U.S. 161 (1939) 14

United States v. Ospina, 798 F.2d 1570 (11th Cir. 1986)..... 8, 18, 21, 31

United States v. Palma-Ruedas, 121 F.3d 841 (3rd Cir. 1997), *cert. denied*, *Pacheco v. United States*, 118 S.Ct. 725 (1998) and *cert. denied Pedorza-Ortiz v. United States*, 118 S.Ct. 894, and *cert. denied Ruedas v. United States*, 118 S.Ct. 1110 (1998), and *cert. denied Torres-Montalvo v. United States*, ___ S.Ct. ___, 1997 WL 840877, and *United States v. Rodriguez-Moreno*, Petition for Cert. Filed, 66 USLW 3474 (1998)..... 41

United States v. Potamitis, 739 F.2d 784 (2nd Cir. 1984)..... 34

United States v. Reed, 773 F.2d 477 (2nd Cir. 1985) 15

United States v. Ryan, 894 F.2d 355 (10th Cir. 1990) 15

United States v. Savage, 67 F.3d 1435 (9th Cir. 1995), *cert. denied*, 516 U.S. 1136 (1996) 35

United States v. Shelton, 66 F.3d 991 (8th Cir. 1995), *cert. denied*, 517 U.S. 1125 (1996) and denial of post-conviction relief *aff'd*, 108 F.3d 977 (8th Cir. 1997)..... 19

United States v. Smith, 44 F.3d 1259 (4th Cir.), *cert. denied*, 514 U.S. 1113 (1995).....30, 31

United States v. Tedesco, 635 F.2d 902 (1st Cir. 1980) 15

United States v. Williams, 788 F.2d 1213 (6th Cir. 1986)..... 15

United States v. Yermain, 468 U.S. 63 (1984)..... 16

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES, AND RULES:

U.S. Const. amend. VI 1, 7, 41, 43
U.S. Const. art. III, § 2, cl. 3 ..... 1, 4, 7
18 U.S.C. § 2 34
18 U.S.C. § 2(a) 45
18 U.S.C. § 3 34
18 U.S.C. § 371 45
18 U.S.C. § 495 29
18 U.S.C. § 668(b)(2) 28
18 U.S.C. § 922(g) 28
18 U.S.C. § 922(g)(1) 19
18 U.S.C. § 922(k) 20, 21, 28
18 U.S.C. § 1341 28
18 U.S.C. § 1956 ..... 22, 43
18 U.S.C. § 1956(a)(1) 2, 25, 26, 35
18 U.S.C. § 1956(a)(1)(B)(i) 35
18 U.S.C. § 1956(a)(1)(B)(ii) 24
18 U.S.C. § 1956(a)(3) 22, 23
18 U.S.C. § 1956(c)(4) 24
18 U.S.C. § 1957 ..... 22, 43
18 U.S.C. § 1957(a) 2, 25
18 U.S.C. § 1957(f)(1) 26
18 U.S.C. § 2315 ..... 17, 19

TABLE OF AUTHORITIES – Continued

Page

18 U.S.C. § 3150 15
18 U.S.C. § 3237 ..... 10, 11, 20, 28
18 U.S.C. § 3237(a) 3, 9
28 U.S.C. § 2312 29
28 U.S.C. § 2313 29
28 U.S.C. § 2314 ..... 17, 18, 29
FED. R. CRIM. P. 18 3

MISCELLANEOUS:

Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. Rev. 751 (1962) 16

William W. Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59 (1944) 42

Armistead M. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 Va. L. Rev. 287 (1926) 16

Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801 (1976) 41, 42

Charles A. Wright, *Federal Practice and Procedure*, (2d ed. 1982) 11, 15

Model Penal Code § 1.13(5) 16

Model Penal Code § 1.13(9) 16

S. Rep. No. 99-433 (1986) 21, 32

1979 Committee Notes to FED. R. CRIM. P. 18 38

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-9a) is reported at 109 F.3d 471. A subsequent amendment to that opinion (Br. in Opp. App. 1) is reported at 115 F.3d 621. The order of the district court (Pet. App. 10a-12a) is unreported. The report, recommendation, and order of the magistrate (Pet. App. 13a-16a) is unreported.

JURISDICTION

Respondent is satisfied with and generally adopts Petitioner's section entitled Jurisdiction.

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

1. Article III, Section 2, Clause 3 of the United States Constitution provides as follows:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

2. The Sixth Amendment to the United States Constitution provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed,

> which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

3. Section 1956(a)(1) of Title 18, United States Code, provides in pertinent part as follows:

> Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity –
>
> * * *
>
> (B) knowing that the transaction is designed in whole or in part –
>
> * * *
>
> (ii) to avoid a transaction reporting requirement under State or Federal law,
>
> shall be sentenced to a fine of not more than $500,000 or twice the value of the property involved in the transaction, whichever is greater, or imprisonment for not more than twenty years, or both.

4. Section 1957(a) of Title 18, United States Code, provides in pertinent part as follows:

> Whoever * * * knowingly engages or attempts to engage in a monetary transaction in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful

> activity, shall be punished as provided in subsection (b).

5. Section 3237(a) of Title 18, United States Code, provides as follows:

> Except as otherwise expressly provided by enactment of Congress, any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which such offense was begun, continued, or completed.
>
> Any offense involving the use of the mails, transportation in interstate or foreign commerce, or the importation of an object or person into the United States is a continuing offense and, except as otherwise expressly provided by enactment of Congress, may be inquired of and prosecuted in any district from, through, or into which such commerce, mail matter, or imported object or person moves.

6. Rule 18, Federal Rules of Criminal Procedure, provides as follows:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

STATEMENT OF THE CASE

Respondent is satisfied with and generally adopts Petitioner's section entitled Statement.

SUMMARY OF ARGUMENT

Article III, Section 2, Clause 3 of the Constitution states that "The Trial of all Crimes . . . shall be held in the State where said Crimes shall have been committed." The Constitution, however, "do[es] not furnish guidance for determination of the place of the crime. That place is determined by *the acts of the accused* that violate a statute." *Johnston v. United States*, 351 U.S. 215, 220 (1956) (emphasis added). The alleged acts of Cabrales that violated the money laundering statute occurred only in Florida. Consequently, the Eighth Circuit correctly held that venue was proper only in Florida.

The government contends that Cabrales can be prosecuted in Missouri because the "dirty" money allegedly came from there. This contention is based on the fact that certain crimes can be "committed" in more than one State, and thus, can be prosecuted in any State in which the crime was "committed". But venue is determined by the acts of the accused that violate a statute, *i.e.*, the actus reus element of the offense. This Court, as well as every lower court that has analyzed a venue issue, has generally performed the same analysis – the terms of the statute are analyzed to determine the proscribed conduct (*i.e.*, the actus reus), then it is determined where that conduct was "committed", and thus where venue lies. Pursuant to this accepted analysis, the Eighth Circuit

correctly determined that the money laundering offenses were "committed" in Florida.

Rather than base venue on the acts of the accused, the government proposes an unconstitutional and unworkable "essential elements" test. Although the government concedes that not every element of a crime can be used to establish venue, Br. for Petitioner, 16, it argues that any "essential element" can be used to establish venue. This "essential elements" test is unconstitutional, injects confusion into the law, is unworkable, and produces absurd results. The government's test would lead to *ad hoc* adjudication regarding which elements, all of which must be proven beyond a reasonable doubt, are essential and which are non-essential in determining venue. In contrast, the "acts" test is simple and predictable, and gives the lower courts workable guidelines to determine the proper venue for a prosecution.

The crime of money laundering is committed only where the actual acts of money laundering occur, not where the underlying drug transactions occurred. Stated differently, the crime of money laundering "begins" when the financial transaction is undertaken, not when the separate underlying crime occurs. By attempting to base venue on the "attendant circumstance" of the source of the money, the government attempts to redefine the term "continuing offense". A "continuing offense" is a crime where the *act itself* is "committed" in more than one district. Money laundering is, of course, *capable* of being a "continuing offense", (*e.g.*, defendant wire transfers money between various banks in different States); however, this is not what the government is claiming. The government's claim is much broader: a rule allowing for

prosecutions in different districts even though all of the alleged *acts of the money launderer* took place in one district.

Prosecuting the instant money laundering offenses anywhere other than Florida, where the crime was allegedly "committed", would disrespect the constitutional provisions and the policies underlying them. As the Court cautioned in *United States v. Johnson*, 323 U.S. 273, 275 (1944), an expansive interpretation of venue could lead to needless hardship on the accused who is forced to defend himself far from home and available defense resources, and could lead to "the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." The constitutional safeguards of venue are some of the most fundamental principles of our criminal justice system, and they should not be hastily balanced away under the guise of cost and inconvenience as the government urges.

The government fails to understand that the central events in a money laundering prosecution occur where the prohibited financial transaction is conducted. Moreover, the government's assertion that Missouri is the victimized community of the alleged crime is misplaced in that the crime of money laundering has as its gravamen issue the misuse of financial institutions and vehicles. Therefore, it is very much in Florida's interest – just as it is in Missouri's interest to interdict drug sales – to deter the misuse of its financial institutions by criminals. This is because the crime of money laundering is conducting the financial transaction, not the "specified unlawful activity". Finally, it will be an extremely rare situation in which the government will have "to choose between

undertaking duplicative efforts to prove the existence of the specified unlawful activity" or "forego[] the money laundering prosecution", Br. of Petitioner at 26. If such a situation occasionally presents itself, the government's complaint is with the Framers who, in both the Constitution and the Bill of Rights, required all crimes to be prosecuted in the State where they were committed.

ARGUMENT

I. The Constitution demands that a criminal defendant be tried where the crime was "committed".

Article III, Section 2, Clause 3 of the Constitution states that "The Trial of all Crimes . . . shall be held in the State where said Crimes shall have been committed." To "underscore the importance of this safeguard, it was reinforced by the Bill of Rights requiring trial 'by an impartial jury of the State and district wherein the crime shall have been committed.' " *United States v. Johnson*, 323 U.S. 273, 275 (1944) (*quoting* U.S. Const. Sixth Amend.). Thus, by constitutional command, venue may only be placed *where the crime was committed*. *United States v. Cores*, 356 U.S. 405, 407 (1958) ("The Constitution makes it clear that determination of proper venue in a criminal case requires determination of where the crime was committed.").

The constitutional provisions, however, "do not furnish guidance for determination of the place of the crime. That place is determined by *the acts of the accused* that violate a statute." *Johnston v. United States*, 351 U.S. 215, 220 (1956) (emphasis added); *accord United States v. Anderson*, 328 U.S. 699, 705 (1946) ("It is, of course, necessary in

order to decide where the crime is committed to ascertain . . . what *acts of the defendant* constituted the violation.") (emphasis added).[1]

Venue issues are discrete; in each case the statute must be analyzed to determine the "nature of the crime alleged and the location of the act or acts constituting it." *Anderson*, 328 U.S. at 703; *accord Travis v. United States*, 364 U.S. 631, 635 (1961) ("The decisions are discrete, each

[1] This Court's precedent strongly supports the notion that it is the acts – and only the acts – of the defendant for which he is being punished that will confer venue in a certain district. The cases cited by the government do not contradict this simple fact. See Br. of Petitioner, 20-21. Those cases merely stand for the proposition that a coconspirator or other accomplice in the *same* crime may be tried where the crime was committed. *See, e.g., Hyde v. United States*, 225 U.S. 347 (1912); *United States v. Griffin*, 814 F.2d 806 (1st Cir. 1987). In cases such as aiding and abetting, conspiracies, or racketeering, courts have recognized that the crime is "committed" where the criminal acts in furtherance of the criminal purpose are performed; thus, these types of crimes are often "continuing offenses", *i.e.*, when the *acts* are "committed" in more than one district. *See, e.g., Hyde*, 225 U.S. at 361-62. In the instant case, the drug dealers' predicate crimes are not part of the money laundering, and the money laundering crime is separate: the drug dealers do not have to be party to the laundering, and the launderer does not have to be a party to the drug dealing. *See, e.g., United States v. Ospina*, 798 F.2d 1570 (11th Cir. 1986) (defendant convicted of money laundering though there was no allegation that defendant was involved in or knew the details of the underlying criminal activity). Of course, if Cabrales *was* a coconspirator in the drug dealing, she could have been prosecuted in Missouri for *that* crime (conspiracy to deal drugs), but not for any other substantive crime she did out-of-state, whether it be money laundering in Florida or a substantive act of drug possession in Illinois.

looking to the nature of the crime charged."). In deciding where an offense was committed and thus where venue lies, "the *locus delicti* must be determined from the nature of the crime alleged and the location of the act or acts constituting it." *Anderson*, 328 U.S. at 703.

It is clear that certain crimes can be "committed" in more than one State, and thus, consistent with the constitutional safeguards, the crime can be prosecuted in any state in which the crime was "committed". See *United States v. Cores*, 356 U.S. 405, 408-09 (1958) (crime of remaining in the United States after the expiration of a landing permit for visiting sailors is continually violated in every district the defendant goes after the permit expires); *Armour Packing Co. v. United States*, 209 U.S. 56, 74 (1908) (Crime to procure transportation of goods at a lower rate than the published tariffs is committed "[w]herever such transportation is received."). Congress recognized the reality that crimes can be "committed" in more than one district when it enacted 18 U.S.C. § 3237(a) which provides that

> any offense against the United States begun in one district and completed in another, or committed in more than one district, may be inquired of and prosecuted in any district in which the offense was begun, continued, or completed.

A continuing offense is simply an offense that is "committed" in more than one district, and therefore can be prosecuted in more than one district.[2] Thus, in the

[2] Conspiracy, which is a subset of the "continuing offense" doctrine is not at issue in this case; however, the analysis herein applies equally to a conspiracy. Conspiracy, like many crimes is

context of a "continuing offense", the crime is committed "wherever the wrongdoer roamed." *Travis v. United States*, 364 U.S. 631, 634 (1961) (citing *United States v. Cores*, 356 U.S. 405 (1958)).[3]

Importantly, § 3237 only applies to crimes that are "committed" in more than one district. Stated another way, even Congress cannot specify that a trial for a crime can be held somewhere other than where the crime was "committed". For example, a statute that said "all money laundering crimes should be prosecuted in Missouri" would be unconstitutional as to crimes "committed" elsewhere. In this regard, this Court has cautioned that § 3237

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capable of being a "continuing offense". *See, e.g., Hyde*, 225 U.S. at 361-66. The crime of conspiracy consists of the "agreement" to accomplish criminal means, and the crime is "committed" by the various acts of the conspirators that show their adherence to the common scheme. *Id.* So wherever any coconspirators commit *acts* in furtherance of the conspiracy, that is where the "agreement", or part of it, took place. *Id.* Courts have reasoned that the defendant's own act – that of agreeing or signing on to the conspiracy or the organization – incorporates by reference the acts of others and makes him vicariously liable for them. *See id.* at 362-64 (recognizing a "constructive" presence of coconspirators in the district where acts in furtherance of conspiracy were committed). In the money laundering context here, and in the example of receipt of stolen property below, there is no act by the defendant that signals agreement with the underlying crimes, even though they may be predicates for the charged crime.

[3] *Cores* was possibly a more limited holding than *Travis* indicated. In *Cores*, the Court held that venue was proper where the defendant was "found" – it did not decide the issue of whether the defendant could be prosecuted in any district where he may have been after the expiration of the permit. *Cores*, 356 U.S. at 409.

must be "read in light of the constitutional requirements and the explicit" language of the offense. *Travis v. United States*, 364 U.S. 631, 637 (1961); *see also Johnston v. United States*, 351 U.S. 215, 223-24 (1956), (Douglas, J., dissenting) (statute should be construed against the two historic constitutional provisions, and any doubts should be resolved in favor of the citizen). Therefore, § 3237 can *only* constitutionally apply to crimes that are "committed" in more than one place.[4] The statute is *about* continuing offenses: offenses "begun in one district and completed in another, or committed in more than one district." 18 U.S.C. § 3237. The government cannot prevail in this case because the government cannot establish that the "continuing offense" doctrine applies to money laundering offenses such that a money launderer whose only acts occur in one State can be prosecuted in another State where the underlying illegal activity took place.

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[4] In its brief, the government states that § 3237 reflects a congressional intent to allow prosecution "in any district permitted by the constitution." Br. of Petitioner, 13-14 & n.4. This is an overstatement. The statute recognizes that certain offenses are "continuing offenses", and allows as a statutory matter prosecution in a variety of districts. Nothing in the statute or in the legislative history, however, suggests that Congress meant § 3237 to be read as "venue can be had wherever the constitution permits" rather than as allowing venue in the specific circumstances which the statute refers. As noted by one commentator, the Reviser's comments quoted by the government, Br. of Petitioner, 13-14 & n.4, "presuppose[ ] that a wide choice of venue is necessarily a good thing, a view prosecutors are likely to share but that many persons, including not infrequently a majority of the Supreme Court, have rejected." 2 Charles A. Wright, *Federal Practice and Procedure*, § 303, at 207 (2d ed. 1982) (footnote omitted).

In determining where a crime was "committed", and thus where venue lies, this Court is "aware that venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it." *Travis v. United States*, 364 U.S. 631, 634 (1961) (quoting *United States v. Johnson*, 323 U.S. 273, 275 (1944)). Thus, analysis begins "from the premise that questions of venue are more than matters of mere procedure. 'They raise deep issues of public policy in the light of which legislation must be construed.' " *Travis v. United States*, 364 U.S. 631, 634 (1961) (quoting *United States v. Johnson*, 323 U.S. at 276).

II. Precedent of this Court has established workable guidelines for determining where a crime was "committed" for purposes of determining venue; the government's "essential elements" argument abandons established precedent and offers a "test" that would cause confusion in the law and would provide no analytical framework for determining venue.

A. Venue is determined by the acts of the accused that violate a statute, *i.e.*, the actus reus element of the offense.

The decisions of this Court state that venue must be "determined by *the acts of the accused* that violate a statute." *Johnston v. United States*, 351 U.S. 215, 220 (1956) (emphasis added); see also *United States v. Anderson*, 328 U.S. 699, 705 (1946) ("It is, of course, necessary in order to decide where the crime is committed to ascertain . . . what *acts of the defendant* constituted the violation."

(emphasis added)) (Statute must be analyzed to determine the "nature of the crime alleged and the location of the act or acts constituting it." *Id.* at 703.).

This Court, as well as every lower court that has analyzed a venue issue, has generally performed the same analysis – the terms of the statute are analyzed to determine the proscribed conduct (*i.e.*, the actus reus), then it is determined where that conduct was "committed", and thus where venue lies. The holdings and language of *Travis*,[5] *Cores*,[6] *Johnston*,[7] *Anderson*,[8] *Johnson*,[9]

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[5] In *Travis*, the Court focused on the statutory phrase "on file with the Board" to determine that the statute penalized "only the single act of having a false statement at a specified place"; thus, the Court held venue to be proper only where the false statement was filed. 364 U.S. at 637.

[6] In *Cores*, the Court focused on the verb "remains" to determine that the crime is "committed" wherever the defendant "remains" after expiration of the landing permit; thus, holding that the venue is proper and the crime can be prosecuted where the defendant "willfully remains after the permit expires." 356 U.S. at 409.

[7] In *Johnston*, the Court focused on the statutory phrase "knowingly fail or neglect or refuse to perform any duty required of him under . . . this title" to determine that "where the crime charged is a failure to do a legally required act, the place fixed for its performance fixes the situs of the crime." 351 U.S. at 219 n.4, 220.

[8] In *Anderson*, the Court analyzed the statute to determine that it mandated the defendant "to take the oath"; the Court, finding that the place of performance and the place of refusal to *act* were identical, held that venue is proper in that district in which the defendant "acted" by refusing "to take the oath". 328 U.S at 706.

[9] In *United States v. Johnson*, 323 U.S. 273 (1944), all nine justices analyzed the case by focusing on the verb phrase "use

Midstate Horticultural Company,[10] *Lombardo,*[11] *Freeman,*[12] as well as all other precedent of this Court, confirm this approach. A number of circuit courts have reflected this emphasis on the *acts* in determining venue in the so-called "key verbs" analysis: the crime is "committed" where the person does the *act* prohibited by the "key verb".[13] Other circuit courts have adopted the so-called

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the mails"; the disagreement between the majority and the dissent centered upon the issue of whether that phrase denoted a "continuing offense", not whether venue could be placed by focusing on other elements of the crime.

[10] In *United States v. Midstate Horticultural Co.*, 306 U.S. 161, 166-67 (1939), the Court focused on the statutory language of "granting and receiving of rebates" to hold that venue was improper in a district other than where the "granting" or "receiving" were alleged to have occurred.

[11] In *United States v. Lombardo*, 241 U.S. 73, 76 (1915), the Court focused on the verb "file" as being the criminal act. The Court, in rejecting the government's attempt to characterize the crime as a "continuing offense", held that venue is only proper where the statement was required to be filed. *Id.* at 77-78.

[12] In *United States v. Freeman*, 239 U.S. 117, 119-20 (1915), the Court, equating the statutory language "ship" to "transport", held that a statute making it a crime to "ship" into any other State any package of intoxicating liquor could be prosecuted where the liquor was shipped.

[13] The First, Third, Fourth, Eighth, Ninth and Tenth Circuits have adopted the "verb test," which analyzes the operative verbs, key terms, and policies underlying the statute defining the offense. *United States v. Corona*, 34 F.3d 876, 879 (9th Cir. 1994) (Ninth Circuit adopted "key verbs" test, which examines the verbs in a statute that defines the criminal conduct to determine where the offense was committed.); *United States v. Griffin*, 814 F.2d 806, 810 (1st Cir. 1987); *United States v. Georgacarakos*, 988 F.2d 1289, 1293 (1st Cir. 1993) ("To determine venue, we examine 'the key verbs in the statute defining the

"substantial contacts" test to determine venue which takes into account a number of factors, the most important being the site of the defendant's acts.[14] Regardless of the name, there is no appreciable difference between the lower court "tests" for determining venue – each looks to the language of the statute to determine the actus reus of the crime. Commentators have likewise confirmed this approach. See 2 Charles A. Wright, *Federal Practice and Procedure*, § 302, at 199 (2d ed. 1982) (focuses on key

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criminal offense' to find the scope of the relevant conduct." (quoting *United States v. Tedesco*, 635 F.2d 902, 905 (1st Cir. 1980)); *United States v. Donahue*, 885 F.2d 45, 50 (3d Cir. 1989) ("[L]ook at the statutory verb in the description of the offense in determining where an offense was committed."); *United States v. Cofield*, 11 F.3d 413, 416 (4th Cir. 1994) ("[W]e have adopted the 'verb test' as an interpretative aid"); *United States v. Medina-Ramos*, 834 F.2d 874, 876 (10th Cir. 1987); *United States v. Crawford*, 115 F.3d 1397, 1405 (8th Cir. 1997) (applying the "active verb" or "key verb" test to the Child Support Recovery Act). *United States v. Ryan*, 894 F.2d 355, 360 (10th Cir. 1990) ("Courts usually examine the verbs employed in the statute to define the offense.").

[14] The "substantial contacts" test, first articulated by the Second Circuit and since adopted by the Sixth and Seventh Circuits, takes into account a number of factors including the site of defendant's acts and the effect of the criminal conduct. *United States v. Reed*, 773 F.2d 477 (2nd Cir. 1985); *United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181, 1188-89 (2nd Cir. 1989); *United States v. Williams*, 788 F.2d 1213, 1215 (6th Cir. 1986); *United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992); *United States v. Chappell*, 854 F.2d 190, 193 (7th Cir. 1988). The Sixth and Seventh Circuits adopted the *Reed* analysis in determining venue for bail-jumping under 18 U.S.C. § 3150. *Williams*, 788 F.2d at 1215; *Chappell*, 854 F.2d at 193. (In both, venue was proper where release was ordered and in the district where defendant failed to appear.)

verbs of statutes to determine where the crime is committed); see Norman Abrams, *Conspiracy and Multi-Venue in Federal Criminal Prosecutions: The Crime Committed Formula*, 9 UCLA L. Rev. 751, 777 (1962) (author finds the "verb test" important first step in determining venue in a multi-district conspiracy); Armistead M. Dobie, *Venue in Criminal Cases in the United States District Court*, 12 Va. L. Rev. 287, 289 (1926) (The "essential verb usually contains the key to the solution of the question: in what district was the crime committed.").

As stated above, *Johnston* and *Anderson*, and all other precedent of this Court, suggest that the answer to the question of venue is to be found by analyzing each particular statute to determine the "acts" of the defendant that constitute the commission of the crime. *Johnston v. United States*, 351 U.S. 215, 220 (1956); *United States v. Anderson*, 328 U.S. 699, 705 (1946). Crimes are typically defined with reference to three types of elements: (i) conduct (which includes both actions and the accompanying state of mind) (ii) attendant circumstances and (iii) results. See Model Penal Code § 1.13(9), defining "element of an offense" and § 1.13(5), defining "conduct" to include both acts and the accompanying mens rea.[15] Courts confronting venue questions have typically looked to the "actus reus" element as defining

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[15] This Court has used the term "predicate circumstance" to distinguish the actus reus element from "attendant circumstance" elements. *See United States v. Yermain*, 468 U.S. 63, 69 (1984) (holding that the intent elements "knowingly and willfully" modify only the making of "false, fictitious, or fraudulent statements," not the "predicate circumstance" that those statements be made in a matter within the jurisdiction of a federal agency.). As noted in footnote 17, *infra*, a "predicate circumstance" is simply a type or subset of "attendant circumstance".

where the crime was "committed", and a "continuing offense" is typically one where that act *in itself* crosses state lines. See, *e.g.*, *Cores*, 356 U.S. at 408; *Armour Packing Co.*, 209 U.S. at 77. Thus, if a law prohibits "transporting assault rifles in interstate commerce," and the defendant transported assault rifles by train from New York to California, the defendant has committed that *act* in a variety of States, and § 3237 recognizes that this is a "continuing offense" and that it can be punished in any of the States in which the defendant *transported* the assault rifles. See, *e.g.*, *Armour Packing Co.*, 209 U.S. at 77 (the crime is committed in each district through which the "transportation is received at the prohibited rate.").

Of course, there may be other elements to a given crime, in addition to the act: typically, the act is prohibited only if it is committed under certain circumstances, or with a particular state of mind. But the place where those circumstances arose is *not* a place where the crime is "committed". For example, under federal law it is illegal to receive stolen property that has traveled in interstate commerce. See 18 U.S.C. § 2315 (making it unlawful to knowingly receive, possess or conceal stolen property that has traveled in interstate commerce – a crime closely analogous to money laundering, in that it criminalizes the conduct of someone who contributes to the success of unlawful activities by acts *after* another crime was committed). If Smith knowingly purchases in New York goods that were stolen in California, he violates 18 U.S.C. § 2315. The criminal *act* occurs in New York (where he received the stolen property), and that is where Smith must be prosecuted. See, *e.g.*, *United States v. Bozza*, 365 F.2d 220-221 (1966).[16] It is, of course, an "essential

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[16] In *United States v. Bozza*, 365 F.2d 206, 220-221 (1966), Judge Friendly distinguished the actus reus of a § 2314

element" of that crime that the goods in fact were stolen, but that is an "attendant circumstance."[17] The *property* must have been stolen, but Smith did not have to have participated in the theft, or conspired with those who did, or even to know who stole the goods or where they were stolen.[18] Simply put, the crime that Smith "committed" is separate from that of the thieves.[19]

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violation, (*i.e.*, "receipt of stolen stamps"), from acts in preparation of the crime that *did* occur in district to determine that venue was improper for a substantive violation of § 2314 in any district other than where the property was received. *See also United States v. Beech-Nut Nutrition Corp.*, 871 F.2d 1181 (2nd Cir. 1984) (followed *Bozza*).

[17] Because venue should *never* be based on an "attendant circumstance" element, the different types or subdividing of "attendant circumstances" (*e.g.*, status or precondition elements) is an academic issue. It is worth noting that most "attendant circumstance" elements will not raise venue issues (*e.g.*, burglary "at night" or arson of a "residential premises"); the "attendant circumstances" that do raise venue issues will usually involve precondition or status elements ("predicate circumstance" elements) because these tend to involve the possibility of past acts that occurred elsewhere (*e.g.*, "conditions" like "dirty" money or "stolen" property, or a "status" such as "convicted felon").

[18] Just as a money launderer need not have participated in the underlying criminal activity, nor known those who did, or even known what that activity was or where it occurred. *See, e.g., United States v. Ospina*, 798 F.2d 1570 (11th Cir. 1986) (defendant convicted of money laundering though there was no allegation that defendant was involved in or knew the details of the underlying criminal activity).

[19] Of course, if Smith agreed with the thieves in advance that he would fence in New York the goods they were planning to steal in California, then he would be an aider and abettor who was a participant in the underlying crime in California, and Smith could be prosecuted in California for *theft* with the

The same is true of a number of other crimes. For example, a felon in possession of a firearm commits a crime, see 18 U.S.C. § 922(g)(1), but the crime occurs where the gun is possessed (the act) not where the underlying felony took place.[20] See *United States v. Lanoue*, 1998 WL 78817 *2, ___ F.3d ___ (prosecution for violation of 18 U.S.C. § 922(g)(1) proper *only* where defendant possessed the firearm). The fact that the defendant was once convicted of a felony is an "attendant circumstance" element or a "predicate circumstance", not the *act* that constitutes the commission of the offense; thus, even though the conviction of the felony is an "essential element" of the offense that must be proven beyond a reasonable doubt, it is not one that confers venue.[21] Similarly, *as the government*

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principals. See Br. of Petitioner, 22 (*If* Respondent had assisted in the ongoing drug trafficking activities in Missouri, she would be subject to prosecution in that district as an aider and abettor of the trafficking crimes.). But the actual receipt of stolen property (the substantive violation of 18 U.S.C. § 2315) occurs in New York and must be prosecuted there.

[20] The venue issue presented by the felon in possession of a firearm hypothetical is actually less problematic for the government than the one presented by the instant case because the crime of felon in possession requires the *defendant* to have committed the underlying felony whereas the offense of money laundering does not require the defendant to have committed the underlying "specified unlawful activity."

[21] Cases raising issues regarding the element of an offense to which statute of limitations apply are analogous. In the case of a felon in possession of a firearm, it is generally held that the statute of limitations applies to the actus reus of possessing the firearm, not the interstate nexus element that the firearm had traveled in interstate commerce. *See, e.g., United States v. Shelton*, 66 F.3d 991, 992 (8th Cir. 1995) (only required that defendant possess firearm within limitation period, not that it had been

concedes, venue would not be appropriate in the State in which the firearm was manufactured, or where it may have traveled in interstate commerce, even though "affecting commerce" is an "essential element" of the crime that must be proven beyond a reasonable doubt. See Br. of Petitioner, 16 n.5.

Similarly, it is a crime to "transport . . . in interstate . . . commerce, any firearm which has had the . . . manufacturer's serial number removed." 18 U.S.C. § 922(k). The removal of the serial number is an "essential element" of the offense, but someone who transported from Missouri to Wisconsin via Illinois a firearm from which someone removed the serial number three years earlier in Oregon cannot be prosecuted in Oregon: the *act* prohibited is the transportation in commerce, which occurred in Missouri, Illinois and Wisconsin; the fact that the serial number had been removed long before is an element that must be proven beyond a reasonable doubt, but it is an "attendant circumstance" element or "predicate circumstance" that makes the *act* of transporting illegal; it is not a part of the acts constituting the offense. *See Anderson*, 323 U.S. at 705. Put another way, under § 3237, this is not a crime that began in Oregon, or was committed in more than one district that includes Oregon – it is an offense begun in Missouri and ended in Wisconsin, and committed in the three states where the transportation took place. See, *e.g., Armour Packing Co.*, 209 U.S. at 77.

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transported across a State line during that period). If a crime is not an "element" to which the statute of limitations applies, can it be an "element" for purposes of venue? Would not a similar analysis be performed, that is, to look to the actus reus element?

The same is obviously true of money laundering. If the money launderer was a party to the underlying predicate offenses, and aided and abetted them by agreeing to launder the proceeds, he would be guilty of the narcotics crimes that occurred in Missouri. But the actual offense of money laundering is a separate crime,[22] created by Congress precisely because in some cases it could not be shown (and perhaps was not even the case) that the money launderer was connected to the underlying crimes,[23] and so could not be prosecuted for them.[24] Instead, Cabrales is allegedly involved only in the separate and distinct activity of engaging in a financial transaction with allegedly "dirty" money. The source of the money (like where the property was stolen in the receiving example, or the absence of the serial number in the § 922(k) example, or the status of being a convicted felon in the felon in possession example) is the "attendant circumstance" that makes the *act* committed in Florida criminal, but the crime is "committed" in Florida, where the *act* takes place.

The government may argue that it does not disagree with the analysis of these other examples but that those are different cases. However, such an argument would

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[22] See footnote 35, *infra*, and cases cited therein.

[23] *See, e.g., Ospina*, 798 F.2d 1570.

[24] *See* S. Rep. No. 99-433 at 4 (1986) ("[M]any [criminal organizations] now employ professionals to devise and assist in complex laundering operations. Most disturbing is the increasing willingness of a few dishonest attorneys, accountants, and bankers to participate in these sophisticated schemes.").

simply confirm that the government's "essential elements" test has no objective content, and is simply a one-day ticket, "good for this day and train only", constructed as an *ad hoc* justification for its preferred result in this case. See *County of Washington v. Gunther*, 452 U.S. 161, 183 (1981) (Rehnquist, J., dissenting) (quoting *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting). The government should not be permitted to devise *ad hoc* venue tests to permit it to bring charges where and as it chooses. The question asked by the constitution is: where was the offense committed? This Court has consistently focused on the "act" element of the crime to reach consistent, predictable, and sensible results. The government's proposed "essential elements" test would either permit venue in all sorts of arbitrary and unreasonable places (if applied consistently) or be subject to unpredictable *ad hoc* application as the government chooses to declare elements of the crime – all of which are essential to conviction – as "essential" or "not essential" according to its preferred result.

The government formulates the question presented as whether venue for "money laundering under 18 U.S.C. §§ 1956 and 1957 is proper . . . where the illicit funds were generated." Yet, the confusing and unworkable nature of the government's test is demonstrated by the fact that it cannot plausibly be applied even to all cases of money laundering under those statutes. For example, 18 U.S.C. § 1956(a)(3) makes it a crime to conduct or attempt to conduct "a financial transaction involving property represented to be the proceeds of specified unlawful activity".

The "representation" that the money constitutes the proceeds of specified unlawful activity is an essential element of the crime – without it the financial transaction would be legal. *United States v. Dimeck*, 815 F.Supp. 1425, 1428 (D.Kan. 1993), *rev'd* on other grounds, 24 F.3d 1239 (10th Cir. 1994). The government could not plausibly contend that venue is proper in a district that had no connection to the crime but that an undercover agent "represented" it to be the place where the non-existent specified unlawful activity occurred. But the "represented" element bears exactly the same relationship to the money laundering offense under § 1956(a)(3) as the commission of the actual specified crimes to the subsections involved in this case.

Whether called the "acts" test, the "key verb" test, the "substantial contacts" test, or some other name, the same analysis is being performed – the terms of the statute are analyzed to determine the proscribed conduct (*i.e.*, actus reus), then it is determined where that conduct occurred, and thus where venue lies. Venue must be based on the "actus reus" element of the crime. Stated differently, venue cannot be based on the locality (if one exists) of any of the other elements of the offense, *i.e.*, "attendant circumstance" elements. Determining venue on anything other than the "actus reus" of the defendant is unconstitutional, arbitrary, confusing, and will produce *ad hoc* decisions. In contrast, by focusing on the *act* that a statute makes criminal, the result is predictable and clear.

1. The Eighth Circuit correctly determined that the money laundering offenses were "committed" in Florida.

By focusing on the acts made illegal by the money laundering statutes to determine where the crime was "committed", it becomes abundantly clear that, in the instant case, venue is in Florida, not the Western District of Missouri. Count II of the indictment, see App., Pet., 19a-20a, charges Respondent with a violation of 18 U.S.C. § 1956(a)(1)(B)(ii), making it a crime to "knowing[ly] . . . conduct[ ] or attempt[ ] to conduct . . . a financial transaction[25] which . . . involves the proceeds of specified unlawful activity . . . knowing that the transaction is designed in whole or in part . . . to avoid a transaction reporting requirement under State or Federal law." Clearly, the key terms in the statute, and thus, where the crime is committed (*i.e.*, the actus reus element) is where *the defendant* "conducts . . . a financial transaction." Of course, the act must be done with the requisite intent to be criminal (*i.e.*, "to avoid a transaction reporting requirement under State or Federal law" and "knowing that the

[25] The "term 'financial transaction' means (A) a transaction which in any way or degree affects interstate or foreign commerce (i) involving the movement of funds by wire or other means or (ii) involving one or more monetary instruments, or (iii) involving the transfer of title to any real property, vehicle, vessel, or aircraft, or (B) a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree." 18 U.S.C. § 1956(c)(4). Specifically, Count II of the indictment charged Cabrales with the "withdrawal" of money from a financial institution, App., Pet., 19a.

property involved in [the transaction] represents the proceeds of some form of unlawful activity"). Proving the status or categorical delineation of the money that is laundered, (*i.e.*, that it "in fact involves the proceeds of specified unlawful activity," 18 U.S.C. § 1956(a)(1)), is not the "acts of the defendant [that] constitute[ ] the violation", *Anderson*, 323 U.S. at 705, but rather is an "attendant circumstance" element and is therefore not relevant for purposes of determining venue. *Id.* It is clear that what was charged in Count II of the indictment (*i.e.*, the "withdrawal" of money from a financial institution, App., Pet., 19a) occurred in Florida.[26] The alleged conduct which constituted the crime began and ended in a Florida bank on January 23, 1991. The Eighth Circuit correctly held that venue is not proper in the Western District of Missouri for Count II. App., Pet., 9a.

The same analysis applies to Count III. See App., Pet., 20a. Count III of the indictment charged Cabrales with a violation of 18 U.S.C. § 1957(a), which makes it a

[26] Under the language of the statute, the punishable *conduct* is "conduct[ing] a financial transaction" under certain circumstances. One such circumstance includes a financial transaction involving money derived from specified unlawful activity. The commission of the act of the crime that constitutes the specified unlawful activity is not itself a part of the criminal conduct being committed by the money laundering defendant; merely the conduct in question has to "involve" the "proceeds" of a crime (which crime may have been committed by people entirely uninvolved in the money laundering crime itself.) That prior crime is not part of the commission of the money laundering offense. That prior crime is merely a "predicate circumstance" act whose proceeds are "involved" in the acts that constitute the money laundering offense.

crime to "knowingly engage[ ] or attempt[ ] to engage in a monetary transaction[27] in criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity." Like a prosecution under section 1956(a)(1), the status or categorical delineation of the money involved in the prohibited transaction, *i.e.*, that it is "criminally derived property that is of a value greater than $10,000 and is derived from specified unlawful activity," is an "attendant circumstance" element, not the element of the crime that is the "acts of the defendant [that] constitute[ ] the violation." *Anderson*, 323 U.S. at 705. It is therefore not relevant for purposes of determining venue. *Id.* Rather, venue is proper in the district where the defendant "knowingly engages or attempts to engage in a monetary transaction." It is clear that what was charged in Count III (*i.e.*, the "deposit of a monetary instrument", App., Pet., 20a) occurred in Florida. The alleged conduct of the defendant which constituted the crime began and ended in a Florida bank on January 22, 1991. The Eighth Circuit correctly held that venue does not lie in the Western District of Missouri for Count III. App., Pet., 9a.

Under the test derived from this Court's decision in *United States v. Anderson*, 328 U.S. 699 (1946), Cabrales "was not accused of a 'continuing offense.' She was charged with money laundering, for transactions which

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[27] Monetary transaction is defined as "the deposit, withdrawal, transfer, or exchange, in or affecting interstate or foreign commerce of funds or a monetary instrument . . . by, through, or to a financial institution. . . . " 18 U.S.C. § 1957(f)(1). Specifically, Count III charged Cabrales for the "deposit" of a monetary instrument, App. Pet., 20a.

began, continued, and were completed only in Florida." App., Pet., 4a. The Eighth Circuit correctly found that "[t]he only acts which formed the basis for the money-laundering charges in the instant case consisted of banking transactions which Cabrales [is alleged to have] executed only in Florida. Under these facts . . . the District Court correctly dismissed Counts II and III as improperly venued in Missouri." App., Pet., 9a.

B. Permitting venue based on the location of any "essential element" of a crime would inject confusion into the law, and would announce an unworkable test that would produce absurd results.

In its brief, the government concedes that "[i]n the context of [some] federal statutes, the location of the acts establishing a particular element may not reasonably be regarded as an appropriate forum for prosecution of the offense." Br. for Petitioner, 16. Then, in a footnote, the government acknowledges that a defendant charged with being a felon in possession of a firearm cannot necessarily be prosecuted wherever the firearm was manufactured or previously transported in interstate commerce, even though "affecting commerce" is an element of the crime. Br. for Petitioner, 16 n.5. This concession of the government demonstrates some of the problems with the "essential elements" test. First, because it denotes the conceptual error in the "essential elements" test – a crime is not "committed" every place one of the elements occurs. Second, it demonstrates that the government's test is extremely difficult to administer. How are courts to determine when a particular element is not sufficiently

important to confer venue? What distinguishes an "essential" element from a "non-essential" element under the government's test? While the government concedes that a § 922(g) prosecution cannot be had where the firearm was transported in interstate commerce, what about where the underlying felony was committed? Will it concede that too? Or is that something a court will have to decide separately for every element of every federal crime on an *ad hoc* basis? Or does the government just want an unprincipled, special venue rule for money laundering prosecutions?

Applying the government's "essential elements" test to a variety of federal offenses demonstrates its shortcomings, which has already been done as to prosecutions for receipt of stolen property, felon in possession of a firearm, and a prosecution under 18 U.S.C. § 922(k). Other examples abound. For instance, federal law prohibits "deposit[ing]" or "receiv[ing]" mail matter in furtherance of a scheme to defraud, see 18 U.S.C. § 1341; although the scheme to defraud is an essential element of the crime, venue is proper only where the mail is "deposited" or "received",[28] not where the scheme was conceived. The same analysis applies to a violation of 18 U.S.C. § 668(b)(2), which makes it a crime to "exhibit[ ]' or "dispose[ ] of" an "object of cultural heritage" knowing

[28] Crimes that prohibit "use of the mails" as an essential element qualify as continuing offenses. See 18 U.S.C. § 3237(a). However, such crimes are not co-extensive with or inclusive of all crimes committed with any nexus to the mail (*e.g.*, some statutes, such as 18 U.S.C. § 1341, criminalize something other than "use of the mails", even though mailings necessarily occur in the course of the crime).

that the object was stolen, if in fact it was stolen from a museum. The prosecution should not be had where the museum is located, but only where the defendant "exhibited" or "disposed" of the object. Similarly, 18 U.S.C. § 495 makes it a crime for any person to "utter[ ]" or "publish[ ]" as true any forged or counterfeited writing. In such a case, venue is proper only where the defendant "uttered" or "published" the forged instrument, not in the district where somebody else forged it. The same analysis holds true to other criminal offenses[29] that contain similar status or precondition elements, *i.e.*, "predicate circumstances".

All these examples demonstrate that an "attendant circumstance" element – while an absolutely essential element of the crime[30] – cannot confer venue because that is not where the crime was "committed". In contrast to the unworkable "essential elements" test, the "acts" test is simple and predictable, and gives the lower courts workable guidelines to determine the proper venue. Most important, however, the "acts" test is *constitutional* whereas the "essential elements" test would produce results that violate the constitutional venue provisions.

[29] *See, e.g.*, 18 U.S.C. § 2312 (interstate transportation of stolen vehicle); 18 U.S.C. § 2313 (receipt or sale of a stolen motor vehicle or aircraft); 18 U.S.C. § 2314 (interstate transportation of stolen property).

[30] To be sure, "attendant circumstance" elements are "essential elements" of the offense and they must be proven beyond a reasonable doubt; indeed, they are essential to the understanding of what makes the act criminal (*e.g.*, armed robbery is stealing "with a gun"); however, they are not elements which confer venue.

This Court's statement in *United States v. Lombardo*, 241 U.S. 73, 78 (1916), is an apt response to the government's "essential elements" test: "In instances it might, indeed, be convenient; in others, and most others, it would result in confusion and controversies . . . . We hesitate, in order to accommodate the venue of a particular offense, to introduce such confusion."

III. The crimes for which Respondent was indicted were allegedly "committed" within Florida.

A. The underlying criminal conduct is not an element of money laundering.

Petitioner argues that because "an essential element" of the money laundering offenses is that the funds in question must be derived from "specified unlawful activity", Br. of Petitioner, 14, the district in which the unlawful activity occurred is a proper venue for a money laundering prosecution. This argument assumes that venue can be based on the location of elements other than the "actus reus" of the crime, which is incorrect. Moreover, proving that money is "the proceeds of specified unlawful activity" is different than proving the *commission* of certain specified unlawful activity. See *United States v. Smith*, 44 F.3d 1259, 1264 (4th Cir. 1995) ("While it is necessary in order to include such an allegation [that the money be derived from specified unlawful activity], the requirement is merely a categorical delineation of the type of funds that are subject to a money laundering charge.").

In proving that the money in question "involves the proceeds of specified unlawful activity," it is irrelevant

who committed the underlying illegal activity, specifically *when* it was committed, *where* it was committed, or *how* it was committed – the government must simply show that the money in question "involves the proceeds of specified unlawful activity." See *United States v. Gabel*, 85 F.3d 1217, 1224 (7th Cir. 1996) ("The particular nature or time of those earlier crimes is immaterial"); *United States v. Ospina*, 798 F.2d 1570, 1581-82 (11th Cir. 1986) (no allegation that defendant participated in underlying illegal activity, but defendant nonetheless convicted of money laundering); *United States v. Smith*, 44 F.3d 1259, 1265 (4th Cir. 1995) (the "core of money laundering, which distinguishes one such offense from another, is the laundering transaction itself."). In *United States v. Gabel*, 85 F.3d 1217 (7th Cir. 1996), the court recognized: "Only when the effort to conduct the financial transaction described by the statute begins does the relevant conduct commence for money laundering itself. Before that, an individual has simply committed burglary, drug dealing, bank robbery, or any of the myriad illegal activities that might lead to ill-gotten wealth. . . . Thus, the commission of the [underlying] illegal acts [that produced the money that was laundered] cannot be considered the 'commencement' of [money laundering]." *Id.* at 1224.

Thus, the government is not required to prove, in connection with a money laundering offense, the particular acts that constituted the specified unlawful activity. It might be enough, for example, for the person who brought the money to the launderer to testify that he was told by the people who gave him the money that it was derived from narcotics activity, without specifying where, when, or how those acts were committed. But if the

underlying acts do not even need to be specifically proven for the crime of money laundering to be proved, the government's contention that such acts are an "essential element" of the crime that can confer venue is plainly wrong.

B. The crime of money laundering is committed only where the actual acts of money laundering occur, not where the underlying "specified unlawful activity" occurred.

The government's argument that money laundering is merely a continuation of the underlying drug transaction and that, therefore, it can be prosecuted where the drug transaction took place suffers from two problems. First, the premise of the government's argument is wrong: money laundering is not merely a continuation of the underlying drug offense. Congress created a separate crime of money laundering[31] precisely to reach individuals who could not otherwise be prosecuted as part of the drug conspiracy,[32] as aiding and abetting the drug transaction, or serving as accessories after the fact. That Congress proscribed money laundering so as to hinder drug traffickers from profiting from their separate crime does not mean that money laundering is a residual part of the drug crime itself. Indeed, money laundering is no more part of the drug crime than interstate transportation of a unlicensed firearm is part of the murder that is committed with the firearm, even though Congress arguably

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[31] See footnote 35, *infra*, and cases cited therein.

[32] *See* S. Rep. No. 99-433 (1986), *supra*, n.24.

prohibited the interstate transportation of such weapons so as to make murder-for-hire more difficult to accomplish.

Second, even if a money laundering offense was, in some sense, a continuation of the drug crime, that fact by itself is insufficient to allow the government to prosecute money launderers where the drug crime is committed. At bottom, this argument by the government equates money launderers with accessories after the fact; indeed, according to the government, a money launderer is merely an accessory after the fact to the drug crime.[33] Even so, it is far from certain that an accessory after the fact could be prosecuted in the district where the underlying crime was committed, if the accessory's acts occurred in a different

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[33] Accessory after the fact is a generous comparison to money laundering because accessories must have the intent to assist the criminal in some way; in other words, there is some basis for linking the accessory to the underlying crime and holding them accountable, at least in part, for that crime. Indeed, the punishment for accessories is determined by reference to the punishment for the underlying crime. Money laundering, in contrast, has no substantive link to a specific underlying crime: the money launderer need not have an intent or knowledge regarding the underlying crime. Moreover, the punishment for money laundering is not set by reference to the underlying crime. Thus, the link between money laundering and the underlying crime is far weaker than the link between accessories and the underlying crime, and, consequently, there is an even weaker basis for allowing the government to prosecute money launderers where the underlying crime is committed. And, of course, Cabrales was not charged as an accessory after the fact; she was charged with the substantive violation of money laundering, a crime allegedly "committed" entirely within Florida.

district. *See United States v. Potamitis*, 739 F.2d 784, 791-92 (2nd Cir. 1984) (venue for accessory after the fact was properly laid in the district where the underlying crime was committed because the accessory engaged in acts in that district). Of course, if an accessory after the fact whose actions occurred exclusively outside the district of the crime cannot be prosecuted where the underlying crime took place, then it follows *a fortiori* that an alleged money launderer whose actions were limited to Florida cannot be prosecuted in Missouri where the underlying drug transaction occurred.[34]

C. Money laundering does not "begin" with the commission of the underlying "specified unlawful activity."

The crime of money laundering "begins" when the financial transaction is undertaken, not when the separate underlying crime occurs. See *Gabel*, 85 F.3d at 1224. If a drug dealer sells a vial of crack cocaine for ten dollars, that is not the "beginning" of money laundering. If that drug dealer takes the ten dollars directly to the grocery and buys a loaf of bread and some milk, or puts it in a sack under his mattress, no money laundering offense occurs. It is only if the drug dealer undertakes to engage in a financial transaction that satisfies the conditions of

[34] This is not inconsistent with the fact that acts of aiders and abettors in a crime may confer venue, see Br. of Petitioner, 21, because accessories after the fact are not true accomplices; unlike true aiders, for example, they are not guilty of the underlying offense, but of a separately defined crime, with a different level of punishment. *See* 18 U.S.C. §§ 2, 3.

the money laundering statute that he has begun to commit the separate, additional crime of money laundering.[35]

This does not mean that the money "being" the fruit of unlawful activity is not an element of the crime. To be sure, it is an element of money laundering – but it is an "attendant circumstance" element or "predicate circumstance", not a part of the *act* element. The crime of money laundering does not "start" until the financial transaction

[35] It is clear that money laundering constitutes a separate, distinct crime that follows in time the underlying illegal activity. *United States v. Heaps*, 39 F.3d 479, 486 (4th Cir. 1994). *See also United States v. Edgmon*, 952 F.2d 1206, 1213 (10th Cir. 1991) ("Congress appears to have intended the money laundering statute to be a separate crime distinct from the underlying offense that generated the money to be laundered."). The crime of money laundering, by definition, cannot occur until after the completion of the underlying "specified unlawful activity." 18 U.S.C. § 1956(a)(1); *United States v. Edgmon*, 952 F.2d at 1214 ("Congress aimed the crime of money laundering at conduct that follows in time the underlying crime rather than to afford an alternative means of punishing the prior 'specified unlawful activity.' "); *United States v. Savage*, 67 F.3d 1435, 1441 (9th Cir. 1995) ("Congress considered money laundering to be separate conduct occurring after completion of the underlying criminal offense."). Indeed, in *United States v. Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994), the Court recognized that it "stressed in *Edgmon* that a violation of § 1956(a)(1)(B)(i) must 'follow in time' the completion of the underlying" unlawful activity. This analysis is also true to a section 1957 violation. See *Savage*, 67 F.3d at 1442 ("we conclude that 'criminally derived property' under § 1957 is equivalent to 'proceeds' under § 1956, i.e., funds obtained from prior, separate criminal activity."); *United States v. Johnson*, 971 F.2d 562, 569-570 (10th Cir. 1992) ("criminally derived property" is the proceeds obtained by the defendant from an underlying criminal offense before the defendant engages in the monetary transaction prohibited by section 1957).

is undertaken just as the crime of "felon in possession" does not "begin" with the prior felony. That crime "begins" when the felon first acquires the gun; the conviction for the earlier felony is just a precondition to the acquisition of the gun being unlawful rather than lawful. By stating that a crime "begins"[36] on the occurrence or happening of an "attendant circumstance" element (*i.e.*, a "predicate circumstance" element), the government attempts to redefine what is a "continuing offense" so as to render the constitutional venue provisions meaningless.

D. By attempting to base venue on an "attendant circumstance" element, the government attempts to redefine what is a "continuing offense".

Interstate transportation provides the best example of what is a "continuing offense". See, *e.g.*, *United States v. Freeman*, 239 U.S. 117 (1915); *Armour Packing Co. v. United States*, 209 U.S. 56 (1908). In *Armour Packing*, the defendants were convicted of a crime making it unlawful to transport goods at rates below the published tariffs. 209 U.S. at 70-71. The Court reasoned that "transportation" was "the essence of the offense" and held that the crime

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[36] Similar to the statute of limitations issue raised in footnote 21, under the government's theory, a drug dealer could take the money generated by his illegal trade and put it under his mattress for five years, waiting for the statute of limitations to run on the money laundering crime. Then the drug dealer could conduct a financial transaction which constitutes money laundering and possibly avoid prosecution based on the statute of limitations.

was committed, and, thus, venue was proper, "[w]herever such transportation is received." *Id.* at 72. The Court applied the "continuing offense" doctrine because "transportation equally takes place over any and all of the traveled route, and during transportation the crime is being constantly committed." *Id.* at 76.

A true "continuing offense" is also exemplified by *United States v. Cores*, 356 U.S. 405 (1958). In *Cores*, the defendant was convicted of a crime that punished "any alien crewman who willfully remains in the United States" after the expiration of a landing permit. *Id.* at 408. Not surprisingly, the Court determined that, after the permit expired, the statute was continually violated "until [the defendant] physically leaves the United States." *Id.* at 409. The Court, in finding the crime to be a "continuing offense", held that the defendant engaged in the proscribed criminal conduct of "remaining" in each place the defendant went after the permit expired. *Id.*

As is demonstrated by *Armour Packing* and *Cores*, a true "continuing offense" begins where the defendant has taken all actions necessary to be prosecuted (the crime is complete) and ends where the defendant discontinues his actions.[37] It is important to recognize, however, that just

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[37] This analysis is true when dealing with an offense that contains only one actus reus element, such as money laundering. Complex, multiple-act crimes such as RICO violations and conspiracies are not complete until the criminal purpose has been accomplished, but because the "agreement" is constantly being performed it is a "continuing offense". For purposes of this case, it is enough to say that no proscribed criminal acts of money laundering occurred in Missouri, and thus venue is not proper in that State.

because a particular statute is *capable* of being a "continuing offense", does not mean that it *is* a "continuing offense" in all circumstances – to be a "continuing offense" the *act itself* must have been "committed" in different districts. In this sense, of course, money laundering is *capable* of being a "continuing offense", (*e.g.*, defendant wire transfers money between various banks in different States); however, this is not what the government claims. The government's claim is much broader: a rule allowing for prosecutions in different districts even though all of the alleged acts of the money launderer took place in one district. To be guilty of a continuing offense, it must be the defendant himself who acts or directly causes an act in that district.[38] The alleged actions of Cabrales occurred exclusively within Florida; therefore, the alleged crime cannot be a "continuing offense".

The facts of the instant case do not warrant a "continuing offense" analysis. Cabrales was not charged with the underlying illegal activity – the alleged source of the money that was laundered. Cabrales was charged with certain crimes that involved certain alleged financial transactions that allegedly occurred in one place at one time. Venue must be decided on the charges that the government has filed. Anything else would make a mockery of the constitutional provisions and court rule[39] that ensure a defendant the absolute right to be tried where

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[38] As noted in footnotes 1 and 2 above, aiding and abetting, conspiracies, and racketeering permit acts of another to be imputed to the defendant. For the reasons stated in those footnotes, this case does not present such an issue.

[39] See FED. R. CRIM. P. 18.

the alleged crime was "committed". The "continuing offense" analysis is wholly inappropriate when the alleged conduct that constituted the offense spanned only several minutes in a Florida bank.

Considering the offenses charged, the Eighth Circuit was correct in holding that Respondent "was not accused of a 'continuing offense.' She was charged with money laundering, for transactions which began, continued, and were completed only in Florida." App., Pet., 4a.

IV. Prosecuting the instant money laundering offenses anywhere other than Florida, where the crime was "committed", would disrespect the constitutional provisions and the policies underlying them.

A. The Constitution demands that crimes be prosecuted where the crime is "committed".

The constitution demands that crimes be prosecuted where the crime takes place. As the Court cautioned in *Johnson*, an expansive interpretation of venue could lead to needless hardship on the accused who is forced to defend himself far from home and available defense resources, and could lead to "the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." 323 U.S. at 275; *Travis v. United States*, 364 U.S. 631, 634 (1961) ("We are also aware that venue provisions in Acts of Congress should not be so freely construed as to give the Government the choice of 'a tribunal favorable' to it.").

A money launderer who spent his whole life in New York, processing cash for a variety of criminal enterprises, about whose extent, location, and criminal acts he

is unaware, is a wrongdoer who should be punished, but his bad acts are "committed" in New York. Under the government's theory he could be prosecuted wherever the "dirty" money came from, which may be a variety of different places, and this could be done regardless of whether he was being tried together with the perpetrators, whether he knew them or whether he even had any idea that the money he laundered came from a specific place or from those particular activities. This seems wrong because it is wrong.

B. The Constitutional safeguards of venue are for the protection of the accused, not the government.

As noted by the government, the constitutional venue provisions are, first and foremost, for the protection of the accused. Br. of Petitioner, 23-24. It may be more convenient for the government to prosecute Cabrales in Missouri,[40] but the Constitution is concerned about what is convenient for Cabrales (and other persons accused of crimes) who may have never left Florida and may never have known where the money originated, much less that it came from drug transactions in Missouri.

In rejecting a similar argument to what the government now makes to this Court, the United States Court of

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[40] It would also have been efficient and advantageous to the government to try the Unabomber's murders all at once (and it could have been joined under Rule 8 if they all took place in the same State) but they did not, so there had to be separate proceedings in California and New Jersey.

Appeals for the Third Circuit stated: "Essentially, the government wants to have the *option* of venue – that is it does not want to be *restricted* to trying these cases" where the violation occurred. *United States v. Palma-Ruedas*, 121 F.3d 841, 850 (1997). The Third Circuit had little sympathy for the government's argument regarding the hardship and inconvenience of having to prosecute the crime where it was committed. *Id.* The court stated: "Many constitutional guarantees for criminal defendants are inefficient and costly – right to counsel comes to mind. Nevertheless, these guarantees form the bedrock principles of our criminal justice system and should not be hastily balanced away."[41] *Id.*; see also *United States v. Johnson*, 323 U.S. 273, 276 (1944) ("If an enactment of Congress equally permits the underlying spirit of the constitutional concern for trial in the vicinage to be respected rather than to be disrespected, construction should go in the direction of constitutional policy. . . . ").

The right to be tried where the crime was "committed" was one of the most important right to the framers of the Constitution.[42] It was one of the few rights

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[41] Arguably all of the constitutional safeguards that are contained in the Sixth Amendment are costly and inefficient, but this does not mean that they should not be respected. Indeed, the rights contained in the Sixth Amendment are the most fundamental principles of our criminal justice system.

[42] The venue provisions contained in the constitution were in reaction to English laws that permitted colonists as well as British soldiers to be tried in England when the alleged crime was committed in America. See Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 806-808 (1976). Resentment against these laws was so deep that the Declaration of Independence denounced King George III "[f]or transporting us beyond Seas to be tried

included in both the original text of the Constitution and the Bill of Rights. As one commentator put it: "With the adoption of [Article III, sec. 2, cl. 3], citizens of the United States were assured that constitutional limitations on venue had been established. Citizens could not be transported beyond the boundaries of the state in which the crime had been committed for the trial of the crime." Drew L. Kershen, *Vicinage*, 29 Okla. L. Rev. 801, 808 (1976). The later adoption of the Sixth Amendment built on this fundamental right afforded to criminal defendants.

C. The government's policy argument misperceives the purpose of money laundering statutes and the issues presented at the prosecution of a money laundering offense.

The government asserts that in many money laundering cases, the dispute will be about the origin of the funds, and evidence of that will best be found where the funds were generated. Br. of Petitioner, 25-26. The government has cited no authority for this counter-intuitive assertion. It would be unusual for the defense in a laundering case to deny that there were drug transactions in Missouri, especially when the drug dealers have already been convicted. See Br. of Petitioner, 6, n.1. The question is whether the proceeds can be traced to the money that

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for pretended offenses." *Id.* at 807. Indeed, this practice of England has been described as one of the precipitating factors of the American Revolution. *See, e.g.*, William W. Blume, *The Place of Trial of Criminal Cases: Constitutional Vicinage and Venue*, 43 Mich. L. Rev. 59, 63-67 (1944).

was laundered, whether the defendant knew that they were the fruits of illegal activity, whether the defendant intended to conceal their origin, etceteras. These are all issues as to which the evidence is more likely found where the launderer operated and received the money than where the underlying crimes took place.[43]

The government's policy argument is not only flawed in failing to understand that the central events in a money laundering prosecution occur where the prohibited financial transaction occurred, but also that the crime of money laundering has as its gravamen issue the misuse of financial institutions and vehicles. See 18 U.S.C. §§ 1956, 1957. Therefore, it is very much in Florida's interest – just as it is in Missouri's interest to interdict drug sales – to deter the misuse of its financial institutions by criminals. The legislative history, relied on by the government, supports this analysis. See Report of the Senate, *supra*, footnote 24. Florida has a much stronger interest in prosecuting the money laundering charge, just as Missouri had the stronger interest in prosecuting the underlying drug charges, (which it did prosecute).

Finally, the key requirement of the Sixth Amendment is that the *jury* be drawn from the district where the crime was "committed". It is possible that a Florida jury may look differently on certain kinds of banking transactions

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[43] Furthermore, this argument is irrelevant, both because policy considerations can never trump the Constitution and also because the government has never claimed that it could not prosecute Cabrales in Florida. Therefore, the "crocodile tears" the government sheds over how difficult it would be for Cabrales to defend herself in Florida are disingenuous.

than a Missouri one. For example, a metropolitan coastal community with a high population of immigrants might look very differently on the act of wiring money abroad to their families than a rural community in Missouri, where wiring money to foreign countries seems unusual in itself. Moreover, the prosecutors themselves may have different attitudes regarding whether certain acts justify prosecution.

D. The "acts" test, while upholding the constitutional venue provisions, will not seriously impede the effective prosecution of criminals.

The government suggests that it must have the ability to try the underlying criminal activity with money laundering charges to conserve scarce resources. See Br. of Petitioner, 26 ("A requirement that money laundering charges be filed in the district where the defendant's financial transactions are alleged to have occurred would impair the efficient conduct of such prosecutions."). To begin, this is an overstatement – the "inconvenience" to which the government refers is an "inconvenience" that the government routinely lives with in the enforcement of the federal criminal law, without any apparent serious detriment. To take a simple and recurrent venue problem, prosecutors are routinely faced with multistate narcotics conspiracies, in which substantive crimes of importation, possession, and distribution take place in a variety of states. It would surely be "convenient" for the government to try all these crimes at once, but the government must choose either to bring separate prosecutions in the different districts or to confine itself to the charges that can be joined in one prosecution in the venue where most

of the crimes occurred. Given the seriousness of the penalties applicable to all of these offenses, the government manages quite successfully to prosecute drug cases despite its inability to combine all of the substantive counts in the same trial. There is no reason why the same should not be true of money laundering. Often more than one crime will, in fact, be committed in the same district, and therefore such claims can be tried together. In other cases, the money launderer can be prosecuted for participation in the narcotics conspiracy, and if convicted of that crime, there will be no particular need to try the separate money laundering cases in the other district. However, the government has that option if the defendant is acquitted or if the government thinks it worth the effort to attempt to secure another conviction. These are everyday problems in the prosecution of narcotics enterprises, and there is nothing special or unique about money laundering that should even tempt the Court to twist its normal understanding of venue rules to accommodate a supposed law enforcement need.

In summary, the "acts" test will not seriously impede the effective prosecution of money launderers or other criminals, as the government suggests. Indeed, it will be a rare situation[44] in which the government will have "to

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[44] This is especially true considering the widespread use of the general conspiracy statute, 18 U.S.C. § 371, and the aiding and abetting statute, 18 U.S.C. § 2(a). As noted previously, if the money launderer were a coconspirator in the underlying crimes, and the laundering were committed in furtherance of that conspiracy, while the laundering charge itself could not be venued in Missouri, the defendant could be charged with conspiracy to commit the underlying crime and tried in

choose between undertaking duplicative efforts to prove the existence of the "specified unlawful activity" or "forego[ ] the money laundering prosecution", Br. of Petitioner at 26, and, if such a situation occasionally presents itself, the government's complaint is with the Framers who, in both the Constitution and the Bill of Rights, required all crimes to be prosecuted in the State where they were committed.

CONCLUSION

The decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

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Missouri, and the money laundering could be proved at that trial as an overt act in furtherance of the conspiracy.